

Statement of Senator Sam Brownback
Committee on Commerce, Science, and Transportation
Full Committee Hearing on DMCA Information Subpoena,
and Digital Rights Management

September 16, 2003

- I would like to begin this morning by thanking Chairman McCain for permitting me to hold this important hearing at the Full Committee. Today's hearing focuses on two timely issues for consumers in the information age: new challenges to their privacy, and an ongoing Federal Communications Commission proceeding that raise the specter of depriving them of their customary and legal uses of broadcast television content.
- Our first panel will discuss the merits of the Digital Millennium Copyright Act's information subpoena, included in section 512(h) of the Act. Recently a federal court has held that copyright owners may use the subpoena to compel Internet service providers to disclose to them the names, addresses, and phone numbers of their subscribers suspected of piracy. This occurs when an ISP's service acts as a "conduit", or the transport, over which the subscriber sends and receives data. This subpoena process includes no due process for the accused ISP subscribers.
- This past July, a hardcore pornographer, Titan Media, filed a subpoena against SBC Communications seeking the identifying information of 59 SBC Internet subscribers. Since that time, Titan has offered a most generous amnesty program: those ISP subscribers it suspects of piracy can go to their website and buy porn, and in exchange Titan won't identify them. Gracious indeed.
- I support strong protections of intellectual property, and I will stand on my record in support of property rights against any challenge. But I cannot in good conscience support any tool such as the DMCA information subpoena that can be used by pornographers, and potentially even more distasteful actors, to collect the identifying information of Americans, especially our children.
- Yesterday I introduced the Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003, in part, to eliminate the results of the RIAA's case against Verizon to ensure the DMCA information subpoena cannot be used in this manner.
- The Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003 also addresses other issues vitally important for consumers in the digital environment. This legislation seeks to preserve consumer and educational community customary and legal uses of content, and to create minimum protections for them as digital rights management technologies are increasingly introduced into the marketplace.
- Digital rights management, otherwise known simply as DRM, refers to the growing body

of technology – software and hardware – that controls access to and use of information, including the ability of individuals to distribute that information over the Internet.

- DRM provides content owners with powerful new tools to protect digital content from piracy. DRM can also prohibit Internet redistribution of digital media products. As we have seen with copy protected CDs and the popular tax filing software, Turbo Tax, DRM can also fundamentally change the way consumers have customarily and legally used content.
- Today's hearing seeks to answer the question of whether government should mandate DRM solutions to combat piracy, and whether such an action can be achieved without limiting the public's customary and legal uses of content.
- Two days ago AT&T labs issued a report estimating that 77% of the pirated movie content available through peer-to-peer file sharing software has been made available by movie industry employees, not unaffiliated consumers. This report raises strong questions about whether digital video piracy occurring today is primarily a governmental or intra-industry issue to be dealt with at this point.
- Currently the Federal Communications Commission is considering how to implement Hollywood's proposal for the Broadcast Flag, a DRM proposal designed to protect digital television programming. The proposal would require that a flag be attached to DTV programming, which would in turn inform consumer electronics devices that the DTV content cannot be redistributed over the Internet.
- The Flag as envisioned by Hollywood is clearly problematic. Today consumers and the educational community are empowered to use content in a host of ways, none of which require the permission of the copyright owner. By including a complete ban on Internet redistribution of DTV programming, Hollywood's Broadcast Flag proposal will artificially limit the way consumers may take advantage of the Internet to make these customary and legal uses. In fairness to Hollywood, I am not aware of an existing DRM technology that both prohibits piracy, yet also allows consumers to redistribute content over the Internet in legal ways.
- Unfortunately, Hollywood's Broadcast Flag proposal also makes it exceedingly difficult for new DRM technologies that strike such a balance to ever be deemed "flag compliant." Hollywood's proposal makes a few large media companies, and a narrow group of consumer electronics manufacturers who own the patent in the initial DRM technology incorporated into the proposal, the gatekeepers in making such determinations.
- To the degree that digital piracy of video content is a real issue, I have proposed a different way to address the protection of DTV content from piracy in the Consumers, Schools, and Libraries Digital Rights Management Awareness Act. Instead of mandating specific technologies, and giving one set of stakeholders a veto over others, my bill would create a self-certification environment, where hardware manufacturers may use whatever

technology they determine meets the requirements of the Flag. In addition, the flag itself imposes a rule that DTV content cannot be *illegally* redistributed to the public over the Internet, which is a more flexible anti-piracy policy than the one in Hollywood's proposal. In my bill it is the FCC that will resolve any disputes that arise in determining if a self-certified technology does not comply with this anti-piracy safeguard.

- These are important issues for our nation's transition to digital television, as the content community has threatened to withhold digital content unless the issue of digital piracy is addressed. I look forward to hearing from our witnesses on these important issues.